Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1701

DR. DON M. SMART, *Petitioner,*

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Dr. Don M. Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 14, 1976.

OPINION BELOW

The District Court granted the Respondents' motion to dismiss on May 7, 1975. This was affirmed by the Fifth Circuit on January 14, 1976 and Petitioner's motion for rehearing en banc was denied on February 25, 1976.

JURISDICTION

Jurisdiction is founded upon the Fifth and Fourteenth Amendments to the United States Constitution; Title 28 U.S.C. Sections 1331, 1343, 2201; and Title 42 U.S.C. Section 1983.

The judgment in the Court of Appeals for the Fifth Circuit was entered on January 14, 1976. A timely petition for rehearing en banc was denied on February 25, 1976 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is the irrebutable presumption of legal consent to the taking of a condemnee's property on withdrawing deposited funds, *State v. Jackson*, 388 S.W.2d 924 (Tex. Sup. Ct. 1965), unconstitutional because of lack of due process, equal protection, and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Is the Texas "quick take" scheme of condemnation, Tex. Rev. Civ. St. Ann., Arts. 3264-3271, which fails to provide interest from the day of the "quick take," unconstitutional because of failure to provide due process, equal protection, and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Can a void state court condemnation proceeding support the *Jackson* type presumption of consent to the taking?

4. Is the Texas "quick take" scheme of condemnation, Tex. Rev. Civ. Stat. Ann., Arts. 3264-3271 unconstitutional for failure to provide a hearing before a fair and impartial body at a meaningful time prior to seizure of the property?

STATEMENT OF THE CASE

Petitioner, Dr. Don M. Smart, is the owner of certain property interests in Collin County, Texas subject to condemnation proceedings by the Respondent Texas Power and Light Company.

Texas Power and Light Company through their attorney, J. E. Abernathy, filed a petition in condemnation for a power line easement against Dr. Don M. Smart and four other Defendants, but not Dr. Scott Smart, in Collin County, Texas in September 1970. Special commissioners, who were appointed by the County Judge, made an award, without apportionment, of $34,000.00 to the Defendants. Texas Power and Light Company, pursuant to Texas law, deposited $68,000.00 into the registry of the Court and went into possession of the property. Several months later the Defendants drew down the amount of the award and divided it among themselves. Some of the Defendants retained J. E. Abernathy as their counsel. He continued to represent some of the Defendants while representing Texas Power and Light Company at the same time. The matter was transferred to the 199th District Court of Texas when Dr. Don M. Smart appealed from the commissioners' award. There has never been any hearing in Texas District Court on this matter, and there has never been an adjudication awarding the power line easement to the company.

The Texas scheme of condemnation is controlled by the Tex. Rev. Civ. Stats. Ann., Arts. 1436, and 3264-71. It specifically spells out the procedure a company must follow in condemning property. In this case, Texas Power and Light Company's president, T. L. Austin, made the decision to condemn Petitioner's property. This was without a corporate resolution. In Texas, the commissioners' hearing is an administrative proceeding and condemnation does not become a case at law until an appeal is made to the award

by any party and is transferred to a Texas state court. At this commissioners' hearing a landowner may not question the right, convenience, or necessity for the seizure of his property as the only question to be considered is damages. The Texas statutory scheme does not provide any means of compensating the landowner from the time he is dispossessed until there is a judicial determination of damages, which may be several years, and in this case there is a time lapse of six years without any adjudication yet, Dr. Smart still retains title to his property.

Texas law has been settled by *State v. Jackson*, 388 S.W. 2d 924 (Tex. Sup. Ct.) that a landowner waives his right to contest the validity of the taking of his property if he draws down the commissioners' award. This waiver is forced upon the landowner even though the award money is taken away from him. The condemnor is able to make a profit on the property seized and forfeits no legal rights by making such a seizure even though he does not have legal title.

The Texas scheme penalizes the landowner who draws down the award by holding he may not contest the validity of the taking although he receives no consideration for this forfeiture of his legal rights and there is no provision under Texas law to place him in the same monetary position he had before his property was seized.

The order of dismissal by the District Court was bottomed on *State v. Jackson*. In *Jackson*, the Texas Supreme Court held the landowner forfeited his right to contest the validity of the taking of his property because he drew down the award and at the same time, that Court took away his award. The forfeiture was predicated on the legal fiction that the landowner could draw down and keep the award. This was not true as the Court took away his award. Fur-

thermore, Jackson's property was expropriated and he was given only nominal damages of $1.00.

Dr. Don M. Smart would not have had any property in hand or have received any payment of interest for the last six years had he not drawn down the award. The Texas statutury scheme has no provisions to reimburse the landowner from the time of the seizure of his property without extracting the penalty of forfeiture of his constitutional right to contest the taking. This is in contrast to the giant power companies who have demanded and received their just compensation as a fair return on their property from the time it is taken without waiving any constitutional rights.

In another suit in which Texas Power and Light Company condemned property of Dr. Don M. Smart in Dallas County, Texas, the company abandoned their condemnation proceedings although they had made the same claim as to the necessity of the taking.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS BASED UPON *STATE V. JACKSON*, 388 S.W.2d 924 (TEX. SUP. CT. 1965), WHICH IS UNCONSTITUTIONAL IN DENYING DUE PROCESS, EQUAL PROTECTION, AND JUST COMPENSATION AS PROVIDED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE JACKSON WAS PREVENTED FROM CONTESTING THE TAKING OF HIS PROPERTY WHEN HE WITHDREW DEPOSITED FUNDS WHICH HE WAS NOT ALLOWED TO RETAIN AND HIS LAND WAS EXPROPRIATED AND HE WAS ALLOWED ONLY NOMINAL DAMAGES OF $1.00.

In *State v. Jackson*, 388 S.W.2d 924 (Tex. Sup. Ct. 1965), the landowner Jackson withdrew $1,100.00 which was the commissioners' award. The Texas Supreme Court denied his right to assert the condemning authority had no legal right to take his property on the legal fiction that he would not be permitted to retain his compensation and at the same time assert his right to contest the taking. The legal fiction was that Jackson got to retain the $1,100.00. It is necessary to read both the Texas Court of Civil Appeals and the Texas Supreme Court decisions to learn that the Supreme Court took away Jackson's land, took away his $1,100.00, and awarded him only nominal damages of $1.00. This cannot support due process, equal protection and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States as a matter of law and makes *Jackson* unconstitutional.

In the alternative, if the award constitutes the consideration for his legal right to contest the taking, then there was no compensation for the property. If the award is the money equivalent of the property, then there was no just compensation for the forfeiture of his legal right to contest the taking and the case is still unconstitutional.

Under Texas law it would be a denial of equal protection of law for the landowner to forfeit any right upon withdrawing the deposited funds which is the money equivalent of the property as the condemnor does not forfeit any rights by seizing the property.

2. THE TEXAS SCHEME OF CONDEMNATION IS UNCONSTITUTIONAL AS THERE IS NO PROVISION FOR A CONDEMNEE TO RECEIVE INTEREST FROM THE DAY OF THE TAKING OF HIS PROPERTY WHEN THE CONDEMNOR DEPOSITS THE AWARD.

There is no provision under the Texas condemnation statutes for a condemnee to receive interest from the day of the taking of his property when the condemnor deposits the award, Tex. Rev. Civ. St. Ann., Arts. 3264-71. The Fifth Circuit set forth the case of *Brunson v. State*, 444 S.W.2d 598 (Tex. Sup. Ct. 1969) for the proposition that interest computed from the day of the taking is a proper element of the final award under Article 3265, Tex. Rev. Civ. St. Ann. *Brunson* is not in point because in that case no award was deposited by the condemnor. The present case is concerned with interest from the day of the taking when an award has been deposited. Since the Fifth Circuit sought to seek authority to give interest from the day of the taking, it must be inferred that the Texas condemnation statutes are unconstitutional as they now stand as there is not any authority that a condemnee can receive money from the day of the taking if the condemnor deposits an award.

Assuming arguendo that *Brunson v. State* did allow a condemnee to receive interest from the day of the quick taking when an award is made, it still would not meet the constitutional mandate that the condemnee must be placed in the same position monetarily as before the condemnation. In the present case there was an award of $34,000.00 and the case has now been pending for six years. Assuming a rate of interest at 6%, there would be an accrual of interest of $2,040.00 every year, which would make a total accrual of interest of $12,240.00 plus the original $34,000.00, which would give the landowner $46,240.00 at the end of six years. This would be following the *Brunson* formula in computing interest from the day of the quick taking. This is not equivalent to having the property in hand and being allowed to reinvest the interest annually. With a reinvestment of 6% interest annually, the landowner at the end of six years would have $48,229.63. The landowner would still not be receiving just compensation as set forth by the Supreme

Court that he must be in the same monetary position after the taking as before, *U. S. v. Miller*, Cal, 63 S.Ct. 276, 279; 317 U. S. 369; 147 A.L.R. 55; and 87 L.Ed. 336.

The Fifth Circuit in seeking a way to save the constitutionality of the Texas condemnation procedure would find their formula for figuring inteerst would make the landowner in the present case short by $1,989.63 as compared with drawing down the award.

3. THE DECISION BELOW USED A VOID STATE CONDEMNATION PROCEEDING TO SUPPORT THE *JACKSON* TYPE PRESUMPTION OF CONSENT TO THE TAKING.

The Fifth Circuit adjudicated on January 14, 1976 that Dr. Scott Smart was the owner of an undivided one-quarter interest of the property in question, *Dr. Scott Smart v. Texas Power and Light Company*, 525 F.2d 1211 (1976). This ownership is res judicata as to the parties in the present suit. Dr. Scott Smart was not made a party to the condemnation proceeding involving Dr. Don Smart and such an error upon the part of Texas Power and Light Company is fatally defective as notice and service upon the landowners is positively jurisdictional, *City of Houston v. Kunze*, 262 S.W.2d 947 (Tex. Sup. Ct.); *Parker v. Fort Worth and Denver City Ry. Co.*, 19 S.W. 518 (Tex. Sup. Ct.); *Littlejohn v. Lone Star Gas Company*, 347 S.W.2d 956; and *Karl v. State*, 345 S.W.2d 358. The term owner includes any person who has an interest in the property and only when every interest of every character is acquired can the property be devoted fully and without restraint or interference to the public purpose and only when every person is compensated as an owner is the constitutional mandate fulfilled, *Houston North Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 786, 793 (Tex. Sup. Ct. 1936). Texas Power and

Light Company's remedy under the Texas law is to take a non-suit in state court and initiate a new proceeding for condemnation including Dr. Scott Smart as a party Defendant, *Gandy v. State*, 319 S.W.2d 375.

The state court proceeding is also void in that the Texas Power and Light Company did not pass a resolution condemning Dr. Don M. Smart's land and it was not possible as a matter of law to delegate the right of eminent domain to its president, T. L. Austin, who was the only individual making the decision to condemn Dr. Smart's land, *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. Sup. Ct. 1975).

It is ironic that Petitioner should be procedured out of court when the fundamental procedural defects committed by Texas Power and Light Company are ignored. This is an example of condemnation procedure at the present time in Texas and there is not any pretext of following due process, equal protection, and just compensation as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. THE TEXAS "QUICK TAKE" SCHEME OF CONDEMNATION, TEX. REV. CIV. STATS. ANN., ARTS. 3264-3271 IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE A HEARING BEFORE A FAIR AND IMPARTIAL BODY AT A MEANINGFUL TIME PRIOR TO SEIZURE OF THE PROPERTY.

Under Texas condemnation proceedings a landowner is served with a notice of a commissioners' hearing, which is a nonjudicial administrative proceeding, which only considers damages. After the award, the condemnor may post the amount of the award and go into possession. There is no opportunity whatsoever for the landowner to contest the validity of the taking of his property.

When a benefit is to be administratively terminated, the beneficiary must be given notice which details the reasons for the proposed determination and afforded a suitable opportunity to prepare for a hearing, *Goldberg v. Kelly*, 397 U.S 254. A hearing in which property rights are to be affected must be granted at a meaningful time and manner. *Armstrong v. Manzo*, 380 U. S. 545. The purpose of such a hearing is to protect the landowner in the use and possession of his property from arbitrary enchroachment and to minimize substantially unfair or mistaken deprivations of property, the danger of which is especially great when the state seizes goods simply on the application of or for the benefit of a private party, *Fuentes v. Shevin*, 407 U. S. 67. This hearing must ordinarily be held in advance of the deprivation, *Sniadach v. Family Finance Corporation*, 395 U. S. 337. Texas Power and Light Company conducted the only hearing and determination for the condemnation of Dr. Don Smart's property before this seizure. There is no provision under Texas condemnation procedure for Dr. Smart to contest the taking prior to the seizure. Texas Power and Light Company has a substantial pecuniary interest in the seizure of Dr. Smart's property. Due process requires the person or body conducting the hearing or making the determination shall be free of any interest in the controversy, *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 500.

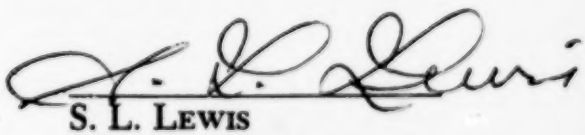
Present Texas condemnation procedure is clearly in conflict with the cited case law as to due process, equal protection, and just compensation.

CONCLUSION

State v. Jackson is a legal fiction in which a landowner was expropriated of his right to contest the taking of his property because of his withdrawal of an award which he was not allowed to keep. The Texas "quick take" scheme of condemnation does not place a landowner in the same monetary position after the condemnation as before. The lower court presumed the state court condemnation proceeding was valid when actually it was void. The Texas scheme of condemnation is unconstitutional in not providing an opportunity for a hearing before a fair and impartial body at a meaningful time prior to seizure of property.

This case presents procedural fantasies for denying a landowner due process, equal protection and just compensation. It is of national significance and therefore writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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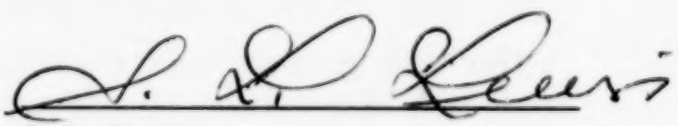
CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for writ of certiorari on counsels for Respondents (three copies each), by depositing same in the United States mail, postage prepaid, on May 21, 1976, addressed to Frank Ryburn, Attorney for Texas Power and Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsels of record for Respondents.



S. L. LEWIS